

## **SUBCHAPTER A : ENFORCEMENT GENERALLY**

### **§70.1. Purpose.**

The purpose of this chapter is to provide general rules governing enforcement actions before the commission. Procedures for contested enforcement cases are located in Chapter 80 of this title (relating to Contested Case Hearings). If some part or parts of these rules cannot be interpreted as consistent with the Texas Water Code, the Texas Health and Safety Code, or the APA, or where applicable parts of those statutes are not specifically included in these rules, the statutes shall control.

Adopted May 8, 1996  
Derived from §337.1

Effective June 6, 1996

### **§70.2. Definitions.**

Unless specifically defined in this chapter, all terms used in these rules bear the same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the APA, and commission rules. The terms specifically defined for the purposes of this chapter are as follows.

**Contested enforcement case** - An action in which the executive director seeks an enforcement order and the respondent, where having a right to do so, contests the issuance of the order by requesting an evidentiary hearing.

**Executive director's preliminary report (EDPR)** - A pleading filed by the executive director which, when issued and served under this title, seeks an enforcement order against a respondent. EDPR is further defined in Subchapter C of this chapter (relating to Enforcement Referrals to SOAH).

**Petition** - The instrument by which the executive director states a cause of action for an enforcement order against a respondent. When an EDPR is filed and issued under this chapter the EDPR and notice constitute a petition, as do amended EDPRs and amended or supplemental petitions.

**Respondent** - A person against whom the executive director is seeking an enforcement order.

Adopted May 8, 1996  
Derived from §337.3

Effective June 6, 1996

### **§70.3. Enforcement Guidelines.**

The executive director may use enforcement guidelines that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These guidelines do not establish rules which the public is required to obey or with which it is to avoid conflict. These guidelines do not convey any rights or impose any obligations on members of the public. These guidelines are available to the public under the terms of the Public Information Act, Texas Government Code, Chapter 552.

Adopted May 8, 1996  
Derived from §337.9

Effective June 6, 1996

#### **§70.4. Annual Enforcement Report.**

The executive director shall prepare an annual report of enforcement actions covering the previous fiscal year. This report shall include, at a minimum, the following:

- (1) the number of complaints received by the agency, indicating the distribution of those complaints geographically;
- (2) an estimate of the total number of facilities subject to inspection by the agency, categorized by region and program area;
- (3) a list of facilities actually inspected, giving location and program area conducting the inspection;
- (4) the number of cases referred from Regions to Central Office for enforcement, categorized by Region;
- (5) the number of cases resolved informally (without issuance of an agency order), categorized by Regional Offices and Central Office;
- (6) a listing of all orders issued, including names of respondents, location of facility covered by the order, programs covered by the order, and amount of administrative penalty assessed (including whether any amount was deferred and, if an amount was deferred pursuant to approval of a supplemental environmental project, a description of the project);
- (7) a calculation of the total, average, and median of administrative penalties assessed, excluding deferred penalties, with an additional categorization of these numbers by program area;
- (8) the number of permit revocations, suspensions, or amendments issued resulting from enforcement actions; and
- (9) the average number of regional inspectors employed.

Adopted May 8, 1996  
Derived from §337.10

Effective June 6, 1996

#### **§70.5. Remedies.**

Remedies available to the commission in enforcement actions include all those found in the Texas Water Code, the Texas Health and Safety Code, and the APA. These include, but are not limited to, issuance of administrative orders with or without penalties, referrals to the Texas Attorney General's Office for civil judicial action, referrals to the Environmental Protection Agency for civil judicial or administrative action, referrals for criminal action, or permit revocation or suspension. Nothing herein shall be construed to preclude the executive director from seeking any remedy in law or

equity not specifically mentioned in these rules. In addition, an enforcement matter may be resolved informally without a contested case proceeding in appropriate circumstances.

Adopted May 8, 1996  
Derived from §337.22

Effective June 6, 1996

#### **§70.6. Judicial Civil Enforcement.**

The executive director is authorized to cause to be instituted, in courts of competent jurisdiction, legal proceedings to enforce and compel compliance with any provisions, whether of statutes, rules, regulations, permits or licenses, or orders, that the commission is entitled or required by law to enforce or with which the commission is entitled or required by law to compel compliance. Such legal proceedings may be initiated at any time by the executive director by a letter from the executive director or an authorized representative referring the matter to the Texas Attorney General's Office and requesting that the attorney general take action on behalf of the commission.

Adopted May 8, 1996  
Derived from §337.6

Effective June 6, 1996

#### **§70.7. Force Majeure.**

(a) Any pollution, or any discharge of waste without a permit or in violation of a permit, shall not constitute a violation under this chapter if the pollution or discharge is the result of causes which are outside the control of the permittee or the permittee's agents and could not be avoided by the exercise of due care. Such acts include, but are not limited to, an act of God, war, strike, riot, or other catastrophe.

(b) The owner or operator of the affected facility shall have the burden of proof to demonstrate that any pollution or discharge is not a violation as provided by subsection (a) of this section.

(c) If force majeure is claimed as an affirmative defense to an action brought under this chapter, the permittee must submit notice to the executive director as provided by §305.125(9) of this title (relating to Standard Permit Conditions).

(d) The executive director shall respond in writing within 30 days from receipt of the notification provided under subsection (c) of this section with a determination as to whether the event constitutes a force majeure and an affirmative defense to an enforcement action.

Adopted May 8, 1996  
Derived from New

Effective June 6, 1996

**§70.8. Financial Inability to Pay; Amount Necessary to Obtain Compliance.**

(a) If any respondent, in response to an EDPR or petition, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

Adopted May 8, 1996  
Derived from §337.50

Effective June 6, 1996

**§70.9. Installment Payment of Administrative Penalty.**

(a) Any person(s), firm, or business may, upon approval of the commission, be allowed to make installment payments of an administrative penalty imposed in an agreed order.

(b) A qualifying small business upon written request shall be allowed to make installment payments of an administrative penalty imposed in an agreed order, subject to the following.

(1) For purposes of this provision, a small business shall be defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees and with net annual receipts of less than \$3 million. For the purposes of this provision, net annual receipts is defined as annual gross receipts less returns, discounts, and adjustments. The period used to determine net annual receipts under this section shall be the preceding 12-month accounting year and can be either a calendar or fiscal-based period.

(2) A business that is a wholly-owned subsidiary of a corporation shall not qualify as a small business under this section if the parent organization does not qualify as a small business under this section.

(3) The amount and payment schedule of monthly installments must be specified by an agreed order.

(4) Payment schedules issued may not exceed a 12-month period.

Adopted May 8, 1996  
Derived from §337.11

Effective June 6, 1996

**§70.10. Agreed Orders.**

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action such that an agreed order is recommended to the commission for approval and issuance. In order to have legal effect as an order of the commission, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission. In such an agreed order, the respondent may agree to:

- (1) admit to none, any, or all of the violations alleged in any EDPR or petition in the case;
- (2) assessment of a specific administrative penalty;
- (3) remedial ordering provisions;
- (4) any combination of these; and
- (5) any other lawful provisions agreed to by the executive director and the respondent.

(b) The effective date of an order, for purposes of compliance with its terms and conditions, including deadlines, shall be the date on which service of notice of the order is achieved under the APA, §2001.142.

(c) When an agreement is reached, the executive director shall file the agreed order with the chief clerk. The chief clerk shall then schedule the agreed order for consideration during a commission meeting under Chapter 10 of this title (relating to Commission Meetings). If the enforcement action is under the jurisdiction of SOAH, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

Adopted May 8, 1996  
Derived from §337.30

Effective June 6, 1996

**§70.11. Notice of Decisions and Orders.**

(a) For rulings, orders, or decisions issued by the commission, parties shall be given notice, either personally or by first class mail, in accordance with the APA, §2001.142. Notice shall also be given in accordance with Texas Health and Safety Code, §382.096, where applicable.

(b) In addition to the requirements of subsection (a) of this section, when the commission issues an enforcement order in which administrative penalties have been assessed, the chief clerk shall

file notice of the commission's decision and order in the Texas Register not later than ten days after the date on which the decision is adopted.

Adopted May 8, 1996  
Derived from §337.57

Effective June 6, 1996

Adoption of §§70.1-70.11  
Date Adopted: May 8, 1996  
Date Filed with the Secretary of State: May 16, 1996  
Date Published in the *Texas Register*: May 28, 1996  
Date Effective: June 6, 1996

**Derivation Table**  
**Chapter 70 - Enforcement**  
**Subchapter A : Enforcement Generally**

This table is track sections during and after rule revisions. The column on the left lists the current sections prior to the revision. The column on the right lists where the section is proposed to end up in the final adoption.

<b>New Section</b>	<b>Old Section</b>
70.1	337.1
70.2	337.3
70.3	337.9
70.4	337.10
70.5	337.22
70.6	337.6
70.7	New
70.8	337.50
70.9	337.11
70.10	337.30
70.11	337.57